

USCA 3071
No. 15979 ✓

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

CHARLES H. RUTHERFORD, Claimant of One
1957 Cadillac "62" Coupe De Ville, etc.,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

JUN 12 1958

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for the **Ninth Circuit**

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**Appeal from the United States District Court for the
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Central Division**

THE UNIVERSITY OF CHICAGO
DEPARTMENT OF CHEMISTRY
CHICAGO, ILLINOIS

1950

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Attorneys, Names and Addresses of	1
Certificate by Clerk	37
Findings of Fact, Conclusions of Law and Judgment	11
Libel of Information	3
Monition of Respondent and Claimant, C. H. Rutherford	6
Notice of Appeal	14
Objections to Findings of Fact, Conclusions of Law and Judgment	10
Statement of Points on Which Appellant Intends to Reply	40
Transcript of Proceedings	15
Witnesses:	
Katayama, Arthur S.	
—direct	18
Ness, Marvin H.	
—direct	27

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LAUGHLIN E. WATERS,
United States Attorney;

BURTON C. JACOBSON,
Assistant U. S. Attorney.

For Appellee:

MURRAY M. CHOTINER,
202 So. Hamilton Drive,
Beverly Hills, California.

United States District Court, Southern District
of California, Central Division

Civil No. 1392-57—TC

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE 1957 CADILLAC "62" COUPE DE VILLE,
License No. MLR 406, Motor No. 5762028343,
Its Tools and Appurtenances,

Respondent.

LIBEL OF INFORMATION

The United States of America, through Laughlin E. Waters, United States Attorney for the Southern District of California, respectfully shows:

First Count

I.

That prior to and on or about August 15, 1957, at Compton, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of the United States and of this Honorable Court, duly authorized Special Agents of the Intelligence Division, Internal Revenue Service, Treasury Department of the United States, seized a certain 1957 Cadillac "62" Coupe DeVille, License No. MLR 406, Motor No. 5762028343, its tools and appurtenances, from

Charles H. Rutherford, which said automobile had been used unlawfully to further violations of Title 26, [2*] United States Code, Sections 4411 and 4412, as follows: that said automobile had been used by said Charles H. Rutherford in receiving wagers without filing application for a wagering permit, and without payment of wagering occupational tax, with intent to defraud the United States of the said taxes, and in violation of said Sections 4411 and 4412, Title 26, United States Code.

II.

That by reason of these premises the said automobile has become and is subject to seizure for forfeiture pursuant to the provisions of Section 7302, Title 26, United States Code.

III.

That the said 1957 Cadillac "62" Coupe DeVille, License No. MLR 406, Motor No. 5762028343, its tools and appurtenances, has been appraised, as provided by law, in the sum of \$4,630.

IV.

That the said Cadillac automobile is presently in the custody of the Intelligence Division, Internal Revenue Service, stored at the General Services Administration Garage, 788 North Main Street, Los Angeles, California, or elsewhere within the jurisdiction of this Court.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Second Count

I.

That prior to and on or about August 15, 1957, at Compton, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of the United States and of this Honorable Court, duly authorized Special Agents of the Intelligence Division, Internal Revenue Service, Treasury Department of the United States, seized a certain 1957 Cadillac "62" Coupe DeVille, License No. MLR 406, Motor No. 5762028343, its tools and appurtenances, from Charles H. Rutherford, which said automobile was intended for use by the said Charles H. Rutherford in receiving wagers without filing application for a wagering permit, [3] and without payment of wagering occupational tax, with intent to defraud the United States of the said taxes, and in violation of said Sections 4411 and 4412, Title 26, United States Code.

II.

Libelant incorporates by reference all the allegations contained in Paragraphs II, III and IV, of the First Count as though herein fully set out.

Wherefore, Libelant prays that the usual process issue against the said automobile, its tools and appurtenances, and that all persons interested in and concerned in the said automobile be cited to appear and show cause why such forfeiture should not be adjudged, and that all due proceedings being had therein, this Honorable Court may be pleased to

condemn the said automobile, its tools and appurtenances, as forfeited to the United States, and that a judgment condemning the said automobile may thereupon be made and entered, and for such other and further judgment and order as to the Court may seem proper in the premises.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Asst. U. S. Attorney,
Chief, Civil Division.

/s/ RICHARD A. LAVINE,
Asst. U. S. Attorney,
Attorneys for Libelant.

[Endorsed]: Filed December 16, 1957. [4]

[Title of District Court and Cause.]

MONITION OF RESPONDENT AND
CLAIMANT C. H. RUTHERFORD

Comes now C. H. Rutherford, and in answer to the Libel of Information on file herein, admits, denies and alleges as to the First Count:

I.

Admits that on or about August 15, 1957, at Compton, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of the United States

and of the above-entitled Court, Special Agents of the Intelligence Division, Internal Revenue Service, Treasury Department of the United States, seized a certain 1957 Cadillac "62" Coupe DeVille, License No. MLR 406, Motor No. 5762028343, its tools and appurtenances, from C. H. Rutherford, this answering respondent, who is the owner thereof; and further admits that this [5] answering respondent did not file an application for a wagering permit and did not pay a wagering occupational tax.

Except as admitted herein, this answering respondent denies generally and specifically each and every other allegation contained in said Paragraph I.

II.

Answering Paragraph II, this answering respondent denies generally and specifically each and every allegation contained in said paragraph.

III.

Answering Paragraph III, this answering respondent alleges that the value of said automobile, its tools and appurtenances, is \$5,000.00, which is the reasonable, fair market value thereof.

Except as admitted herein this answering respondent alleges he does not have sufficient information or belief on the subject to answer the remaining allegations of said paragraph, and basing his denial on said lack of information or belief, denies

generally and specifically each and every other allegation contained in said Paragraph III.

IV.

Answering Paragraph IV, this answering respondent alleges that he is informed and believes that the said Cadillac automobile, its tools and appurtenances, are presently in the custody of the Internal Revenue Service, This answering respondent does not have sufficient information or belief on the subject to enable him to answer the remaining allegations of said Paragraph IV, and basing his denial on such lack of information or belief, denies generally and specifically each and every other allegation contained in said Paragraph IV.

And in Answer to the Second Count, this answering respondent admits, denies and alleges: [6]

I.

Answering Paragraph I, admits that on or about August 15, 1957, at Compton, County of Los Angeles, and within the Central Division of the Southern District of California, and within the jurisdiction of the United States and of the above-entitled Court, Special Agents of the Intelligence Division, Internal Revenue Service, Treasury Department of the United States, seized a certain 1957 Cadillac "62" Coupe DeVille, License No. MLR 406, Motor No. 5762028343, its tools and appurtenances, from C. H. Rutherford, this answering respondent, who is the owner of said automobile, tools

and appurtenances; and further admits that he did not file an application for a wagering permit and did not pay a wagering occupational tax.

Except as admitted herein, this answering respondent denies generally and specifically each and every other allegation contained in said Paragraph I.

II.

Answering Paragraph II, this answering respondent incorporates by reference all of the matters contained in Paragraphs II, III and IV of his answer to the First Count as though fully set forth herein.

Wherefore, this answering respondent prays that the libelant take nothing by virtue of its Libel on file herein; that said automobile, its tools and appurtenances be ordered restored to this answering respondent; that this answering respondent recover his costs incurred herein, and for such other and further judgment and order as to the Court may seem proper in the premises.

/s/ MURRAY M. CHOTINER,
Attorney for C. H. Rutherford.

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 6, 1958. [7]

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT,
CONCLUSIONS OF LAW AND JUDGMENT

Comes now the Libelant, United States of America, and objects to the Claimant's proposed Findings of Fact, Conclusions of Law, and Judgment lodged herein, on the grounds that said Findings of Fact, Conclusions of Law, and Judgment are:

1. Not supported by the evidence introduced at the trial.

2. That the Court has no jurisdiction to award the judgment in the form lodged, i.e. in the alternative, inasmuch as the Claimant's claim was only for the return of the seized property.

The Libelant respectfully requests the Court to set a date on which argument on the within objections may be heard.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Asst. U. S. Attorney,
Chief, Civil Division.

/s/ BURTON C. JACOBSON,
Asst. U. S. Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 18, 1958. [9]

United States District Court, Southern District
of California, Central Division

Civil No. 1392-57—TC

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE 1957 CADILLAC "62" COUPE DE VILLE,
License No. MLR 406, Motor No. 5762028343,
Its Tools and Appurtenances,

Respondent.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND JUDGMENT

This cause came on regularly for trial on the 14th day of February, 1958, before the Court without a jury, and Laughlin E. Waters, United States Attorney, and Richard A. Lavine and Burton C. Jacobson, Assistant United States Attorneys, by Burton C. Jacobson, appearing as attorneys for libelant, and Murray M. Chotiner for respondent and claimant, Charles H. Rutherford, and from the evidence introduced the Court finds the facts as follows, to wit:

1. That on or about August 15, 1957, at Compton, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of the United States and of this Court, duly authorized special agents of the Intelligence Division, Internal Revenue Service, Treasury Department of the United States, seized a cer-

tain 1957 Cadillac "62" Coupe DeVille, License No. MLR 406, Motor No. 5762028343, its tools and appurtenances, from Charles H. Rutherford, who was then and there the owner of said [11] automobile.

2. That said automobile had not been used unlawfully to further violations of Title 26, United States Code, Sections 4411 and 4412.

3. That said automobile had not been used by said Charles H. Rutherford in receiving wagers, nor was it intended for use by Charles H. Rutherford in receiving wagers with intent to defraud the United States of taxes in violation of Sections 4411 and 4412, Title 26, United States Code.

4. That Charles H. Rutherford did not file an application for a wagering permit and did not make payment of a wagering occupational tax as set forth in Sections 4411 and 4412, Title 26, United States Code.

5. That the said automobile did not become, and is not subject to, seizure and forfeiture pursuant to the provisions of Section 7302, Title 26, United States Code.

6. That the said automobile has a value of \$4,630.00.

7. That the said automobile has been and is presently in the custody of the Intelligence Division, Internal Revenue Service, within the jurisdiction of this Court.

As a conclusion of law from the foregoing facts, the Court finds that respondent and claimant Charles H. Rutherford is entitled to the return and possession of said automobile, and it is ordered that judgment be entered accordingly.

In accordance with the foregoing Findings of Fact and Conclusions of Law, It Is Ordered, Adjudged and Decreed that the libelant and its special agents of the Intelligence Division, Internal Revenue Service, Treasury Department of the United States, return and deliver possession of said 1957 Cadillac "62" Coupe DeVille, License No. MLR 406, Motor No. 5762028343, its tools and appurtenances, to respondent and claimant Charles H. Rutherford, and in the event a return thereof cannot be had, judgment is given against libelant for \$4,630.00, the value of said automobile.

Dated: March 3, 1958.

/s/ THURMOND CLARKE,

United States District Judge.

Affidavit of Service by Mail attached.

Lodged February 17, 1958.

[Endorsed]: Filed and entered March 3, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE COURT OF
APPEALS FOR THE NINTH CIRCUIT

Notice Is Hereby Given that the libelant, United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this case on March 3, 1958.

Dated: This 7th day of March, 1958.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Asst. U. S. Attorney,
Chief, Civil Division.

/s/ BURTON C. JACOBSON,
Asst. U. S. Attorney,
Attorneys for Libelant.

[Endorsed]: Filed March 7, 1958. [14]

In the United States District Court, Southern
District of California, Central Division

Civil No. 1392-57—TC

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE 1957 CADILLAC "62" COUPE DE VILLE,
License No. MLR 406, Motor No. 5762028343,
Its Tools and Appurtenances,

Respondent.

Honorable Thurmond Clarke, Judge Presiding

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Friday, February 14, 1958, 10:00 A.M.

The Court: Do you want to make any opening statement or do you want to call your first witness? I imagine it will be a matter of testimony. Do you want to put a witness right on the stand?

Mr. Jacobson: We have a stipulation, your Honor.

The Court: All right.

Mr. Jacobson: Which I believe will save a great deal of time.

The Court: Certainly.

Mr. Jacobson: That on July 26, 1957, Mr. C. H. Rutherford drove a—

Mr. Chotiner: Say the automobile involved in this litigation.

Mr. Jacobson: No; not in this litigation.

Mr. Chotiner: Pardon me. I am sorry.

Mr. Jacobson (Continuing): —drove a Ford automobile to a meeting place, the parking lot of Marc's restaurant.

For the Court's information, here is a rough—

(Indicating sketch appearing on blackboard.)

The Court: All right. Bring it around. (Referring to the blackboard containing said sketch.) Right around there.

Mr. Jacobson: —diagram of the area.

The Court: All right. [3*]

Mr. Jacobson: Marc's is indicated by this red arrow (indicating on blackboard sketch); and met a person by the name of Howard Cupp and a bundle of papers was passed to Mr. Rutherford.

On July 27, 1957, a person by the name of Monica Kissell drove the automobile in question in this case, the 1957 Cadillac, to the parking lot at the same Marc's restaurant and again met Mr. Cupp and a bundle of papers was passed to her.

On July 30th, 1957, Mr. C. H. Rutherford drove the Cadillac in question to the same place and the same thing took place.

On August 5th, Mr. Rutherford drove the Ford that I mentioned before to the same place and the same thing took place.

On the 12th of August, Mr. Rutherford drove the Cadillac to the parking lot of Marc's restaurant and again the same thing took place.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The same thing also happened on the 13th of August.

And on the 14th of August, Monica Kissell in the Ford went to the same place and the same thing occurred.

And then on August 15th, Mr. Rutherford in the Cadillac met Mr. Cupp at the parking lot of the Marc's restaurant and again the same thing, a bundle of papers was passed to Mr. Rutherford. [4]

Mr. Chotiner: It is stipulated that the Federal Agent, if called to the witness stand, would testify in substance and effect as stated by counsel.

The Court: All right.

Mr. Jacobson: We may further stipulate that the License number of the Cadillac involved is MLR 406.

Mr. Chotiner: It is so stipulated.

The Court: All right.

Mr. Jacobson: And that Mr. C. H. Rutherford, the Claimant in the instant action, is the registered owner of said vehicle.

Mr. Chotiner: It is so stipulated, as well as the legal owner of it.

Mr. Jacobson: Is he the legal owner of it?

Mr. Chotiner: He is now. They have been paid off.

Mr. Jacobson: I will call Mr. Katayama to the stand.

ARTHUR S. KATAYAMA

called as a witness herein on behalf of the Libelant, United States of America, being first duly sworn, testified as follows:

The Clerk: Let me have your name, please?

A. Arthur S. Katayama.

Direct Examination

By Mr. Jacobson:

Q. Mr. Katayama, what is your occupation?

A. I am a Special Agent with the Intelligence Division, [5] United States Treasury Department.

Q. Now, I will direct your attention to August 15th, 1957, and ask you if you had occasion to see Mr. C. H. Rutherford on that date?

A. I did.

Q. I will also ask you if you saw the automobile involved in this litigation on that date, the 1957 Cadillac? A. I did.

Q. Where did you see Mr. Rutherford?

A. I saw him first at approximately 6:20 p.m. on August 15th; he and the car drove up to a position approximately next door north of 110 North Burris Avenue in the City of Compton.

Mr. Jacobson: Can everyone see this board (Indicating sketch on blackboard) all right?

The Court: Yes.

Q. (By Mr. Jacobson): Is this (Indicating sketch on blackboard) the area you are referring to?

A. Yes, this is the area right here (Indicating on said sketch).

(Testimony of Arthur S. Katayama.)

Q. For the record—

A. This is 110 North Burriss Avenue (Indicating on said sketch) and this was the automobile. It was parked on the east side of the street, headed north, and it was [6] approximately one door north of the 110 Burriss Avenue.

Mr. Jacobson: For the record, may it show that the witness is pointing to a very rough map of the area in question.

The Court: Yes.

Q. (By Mr. Jacobson): Now, where did you see the Cadillac on that date?

A. At this location approximately one door north of 110 North Burriss.

Q. And was Mr. Rutherford driving the Cadillac? A. Yes, sir.

Q. And he pulled up where you have that apartment house indicated?

A. Yes; that is correct.

Q. What did you next see Mr. Rutherford do, if anything?

A. He got out of the car, looked around and then entered Apartment F at this address, 110 North Burriss avenue.

Q. Did you again see Mr. Rutherford on that date? A. Yes; I did.

Q. Where?

A. In Apartment F at 110 North Burriss avenue.

Q. What were the circumstances giving rise to that meeting?

Mr. Chotiner: To which we object, if the court

(Testimony of Arthur S. Katayama.)

please, on the ground that it is incompetent, immaterial and [7] irrelevant as to what occurred or what this Agent found after they got inside the apartment.

The only question involved here is whether or not this automobile was used or intended to be used in the business of receiving wagers on horse races for which there was no stamp or a registration made in accordance with the Act.

And even assuming, for the sake of discussion, that these officers can prove that there was book making being conducted in the apartment, which I am satisfied they can't, or even assuming that they could establish that Mr. Rutherford was engaged in book making in some form or another, they still must prove that this automobile was used or intended to be used for the purpose of engaging in the business of accepting wagers.

Mr. Jacobson: Your Honor, I submit that what took place in the apartment will prove exactly that allegation.

Mr. Chotiner: No matter what took place in the apartment it couldn't prove how the automobile was used. The automobile was never in the apartment.

Mr. Jacobson: Your Honor, I suggest that may the evidence go in subject to a motion to strike, and if it doesn't tie in to the proof of the allegations——

Mr. Chotiner: Then this case may last two or three days if we are going to listen to all this evidence with the idea [8] that it shall be subject to a motion to strike.

(Testimony of Arthur S. Katayama.)

If they have evidence directly pertaining to this automobile, I think they ought to produce that evidence and not go off on a tangent as to what happened in this apartment.

Mr. Jacobson: Your Honor, what took place in the apartment and what was found in the apartment and the conversation with the claimant Mr. Rutherford directly relates to the use of the automobile as alleged by the Government.

The Court: Well, I think the objection of Mr. Chotiner is well taken. I will sustain the objection.

Q. (By Mr. Jacobson): Mr. Katayama, when you saw Mr. Rutherford pull up in the Cadillac in front of that apartment, did he get out of the car?

A. Yes, he did.

Q. Was he carrying anything?

A. Not that I could see.

Q. Did you ever have occasion to talk to Mr. Rutherford on that day? A. I did.

Q. Would you please relate the substance of what that conversation was?

Mr. Chotiner: Objected to on the grounds it is incompetent, immaterial and irrelevant, and on the further [9] ground that no proper foundation has been laid. It is an endeavor to prove an essential element of the Government's case by extra-judicial statements of the claimant.

The Court: I will overrule the objection, providing it relates to the Cadillac car.

Mr. Jacobson: It relates to the Cadillac car.

(Testimony of Arthur S. Katayama.)

The Court: All right. And Mr. Chotiner would like to have a little further foundation.

Q. (By Mr. Jacobson): Did you have any conversation with Mr. Rutherford about the use of this Cadillac automobile? A. Yes, I did.

Q. Did you have any conversation with Mr. Rutherford about the use of the Cadillac automobile regarding any wagering or bookmaking activities?

A. I did.

Mr. Chotiner: I object on the grounds it is leading and suggestive.

The Court: Well, it is, but it brings it right down to date. It is leading, but I will overrule it—He has answered and I will let it remain.

Q. (By Mr. Jacobson): Now, will you please relate that conversation?

Mr. Chotiner: To which we object, if the court please, on the grounds that it is incompetent, immaterial and irrelevant and an endeavor to prove an essential element [10] of the charge contained here by extra-judicial statements without any foundation to show that the automobile was used for that purpose.

The Court: Yes. I sustained the objection just a minute ago and this is the conversation that you are trying to get in that I sustained objection to a minute ago.

Mr. Jacobson: No, your Honor. Mr. Chotiner objected to anything that he may have found inside the apartment or in regard to anything they may have said inside the apartment.

(Testimony of Arthur S. Katayama.)

The Court: This conversation did not take place inside the apartment, then?

Mr. Jacobson: This conversation took place in the apartment. However, the conversation that Mr. Katayama had with a party to this action, I submit, your Honor, is an exception to the hearsay rule, especially if it contains any admissions by the party.

The Court: I will overrule the objection, and let him relate the conversation with Mr. Rutherford.

A. I had in my hand, at the time I was talking to Mr. Rutherford, a piece of paper and I asked him, "Where did you pick up these markers?" And he related to me he picked them up at Marc's parking lot behind Marc's restaurant from a clerk of Swede's, and I asked him how he [11] got down there, and he said by car.

I said, "Did you use your own car?"

He said, "Yes."

I said, "Did you use Kissell's car?" meaning Monica Kissell. And he said, "Yes, I did."

I said, "How long have you been doing this?" And he said, "Ever since Del Mar opened this year."

I further asked him if he was the registered owner of the car, and he stated he was.

That is all of the conversation pertaining to the car.

Q. (By Mr. Jacobson): Now, did you confiscate these pieces of paper that you said to him "Are these your markers?"

A. I did.

(Testimony of Arthur S. Katayama.)

Q. When was the last time you saw those papers?

A. I saw them in Judge Westover's court during a criminal proceedings pending against Mr. Rutherford.

Mr. Chotiner: May I interrupt so we can clear up one point right here.

Q. These are papers that were found in the apartment, isn't that correct?

A. That is correct.

Q. (By Mr. Jacobson): Now, I want to just clear up the point as to what you said to him about these papers. I want, to the best of your recollection, the words you used [12] when you referred to these papers and what his answer was to them.

Mr. Chotiner: To which I object, your Honor, on the grounds it has been asked and answered, and apparently it is an attempt on the part of the Government now to impeach his own witness. The Agent has testified.

The Court: I will sustain the objection. He has covered it already.

Q. (By Mr. Jacobson): Now, Mr. Katayama, did you have occasion to check the motor number on the instant car? A. I did.

Q. And what is that motor number?

Mr. Chotiner: Can't we stipulate that the motor number he found was the motor number that was on the Cadillac parked in front of or across the street from 110 Burris avenue, which was the same motor number involved in this litigation?

(Testimony of Arthur S. Katayama.)

Mr. Jacobson: Yes.

A. It was immediately north of 110. It was not across the street.

Mr. Chotiner: Well, parked in Compton.

Mr. Jacobson: No further questions of this witness.

The Court: Mr. Chotiner, do you have any questions?

Mr. Chotiner: I don't think so, but I just want to look at my notes. No questions. [13]

The Court: That is all. You may step down.

Mr. Jacobson: At this time, your Honor, I wish to offer in evidence the record of conviction of Mr. Charles H. Rutherford in case No. 26177-Criminal in the Southern District of California, Central Division, in the United States District Court. My authority for offering the record of this conviction in evidence is the case of United States vs. Wainer, 211 Fed. (2d), 669, a Seventh Circuit case in 1954.

Mr. Chotiner: If the court please, we object to that, first of all on the grounds that there is no final judgment of conviction in that case. The matter is on appeal at the present time by the recommendation of the very Judge who found him guilty, who recommended that an appeal be taken.

The Court: Well, I will overrule your objection, Mr. Chotiner, and let it be made an exhibit. In other words, you have in the record that that matter is now on appeal and there is not a final judgment.

The Clerk: It is Government's Exhibit No. 1 now in evidence.

(Said document was received in evidence and marked as Plaintiff's Exhibit No. One.)

Mr. Jacobson: Next, your Honor, I was planning on calling Mr. Rutherford to the stand as an adverse witness [14] under Rule 43(b). I see that the claimant has chose to remain away from court today.

Mr. Chotiner: I object to that statement of counsel as a conclusion on his part as to what he chose to do or what he did not choose to do. If you wanted the witness here, all you had to do was subpoena him.

The Court: I will let the record remain with counsel's statement that Mr. Rutherford is not available to be called.

Mr. Jacobson: Next, your Honor, I would like to call Mary Smith. She is in the Clerk's office.

Mr. Chotiner: What is it you want?

Mr. Jacobson: I want in evidence what those papers were, when we had them in Judge Westover's court.

The Court: Well, can you send someone after her?

Mr. Chotiner: I think we can save time. I think we can stipulate that they were papers introduced into evidence in the criminal trial which were identified by witnesses for the Government as in their opinion constituting records of the names of horses and the amounts bet on them on races run at race tracks in the United States for the dates in question.

Mr. Jacobson: It is so stipulated.

Mr. Chotiner: And all of them having been found in the apartment, 110 Burris; is that correct? [15]

Mr. Jacobson: That is correct.

The Court: All right. Mary Smith is Judge Westover's clerk.

The Clerk: Yes.

Mr. Jacobson: We would like to call Mr. Marvin H. Ness to the stand.

MARVIN H. NESS

called as a witness herein on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: May we have your name for the record, please?

A. Marvin H. Ness.

Direct Examination

By Mr. Jacobson:

Q. Mr. Ness, what is your business or occupation?

A. I am a Special Agent with the Intelligence Division of the United States Treasury Department.

Q. I will direct your attention to August 15th, 1957, and ask you if you had occasion to see a Mr. Charles H. Rutherford on that date?

A. I did.

Q. What time of day was it when you saw him?

A. About five past six in the evening.

Q. And where was it that you saw him?

(Testimony of Marvin H. Ness.)

A. I saw him in the parking lot behind Marc's restaurant [16] at the intersection of Long Beach boulevard and Myrr Street in Compton.

Q. What did you observe?

A. I observed an individual later identified as Howard Cupp approach Mr. Rutherford in his Cadillac automobile and give to Mr. Rutherford a pack of papers and they had a short conversation for approximately two minutes. Then Mr. Rutherford left the parking lot and I and Special Agent Virgil Crabtree followed Mr. Rutherford down Myrr street west to Burris street and north on Burris street until Mr. Rutherford parked the Cadillac in front of the premises at 110 North Burris street.

Q. Now, on that day did you have a conversation with Mr. Rutherford pertaining to that Cadillac, and pertaining to wagering? A. I did.

Q. Will you please relate to the court what that conversation was?

Mr. Chotiner: Objected to on the grounds it is incompetent, immaterial and irrelevant and that it is being used for the purpose of trying to prove an essential element of the Government's case, a conversation, without the proper foundation first having been established to show a prima facie case.

The Court: I will overrule the objection. He may answer. [17]

A. I asked him if the markers—and I indicated some papers on a coffee table in the apartment at the Burris street location—if the markers were the

(Testimony of Marvin H. Ness.)

ones that he picked up from Cupp behind Marc's that day, and he stated that they were.

Mr. Jacobson: No further questions.

Mr. Chotiner: No questions.

The Court: That is all.

Mr. Jacobson: The Government rests, your Honor.

(Whereupon the plaintiff rested its case.)

Mr. Chotiner: The claimant rests.

(Whereupon the Claimant rested his case.)

The Court: The Government rests and the Claimant rests.

Would you like to make some comments to the court?

Mr. Jacobson: Yes, your Honor, I would like to do that.

The Court: I have your trial brief here.

Mr. Jacobson: I would like to make a brief argument, your Honor.

The Court: All right.

(Argument on behalf of the Plaintiff, by Mr. Jacobson.)

(Argument on behalf of Respondent and Claimant, by Mr. Chotiner.)

(Closing argument on behalf of Plaintiff, by Mr. Jacobson.) [18]

The Court: Well, the court feels differently in this particular case so I will give judgment for the Respondent and Claimant. So that will conclude the

matter. I have read the briefs. The testimony was brief and I see no reason to take the matter under submission. That will be all. The court will be in recess.

I guess Mr. Chotiner will prepare the order.

Mr. Chotiner: Yes.

The Court: He has the winning party so I guess the burden will be upon Mr. Chotiner to prepare the order.

Mr. Chotiner: Thank you, your Honor.

Mr. Jacobson: Will there be Findings, your Honor?

The Court: Do you want Findings?

Mr. Jacobson: Yes, your Honor.

The Court: They will have findings. You will have to prepare Findings.

Mr. Chotiner: Surely.

The Court: All right, [19]

(The court hears other matters.)

The Clerk: Number 8 on the calendar, case No. 1392-57-TC Civil, United States of America vs. One 1957 Cadillac Coupe De Ville.

The Court: Yes. We have the Government's objections here as to the Findings. Does the Government have the car now?

Mr. Jacobson: Yes, your Honor.

The Government's objections are twofold. (1), we object to the findings of fact and conclusions of law as not being supported by the evidence. Secondly, we object to the judgment as proposed in that it is in the alternative for the return of the seized property and secondly for a sum certain of money.

The Court: Well, as to the first point I think Mr. Chotiner's is all right. On the other point I think, Mr. Chotiner, on the money, as long as they have the car, we cannot have any alternative. I think you were just trying to protect yourself on that.

Mr. Chotiner: The reason for that is that I heard through the "grapevine" that the Government is intending to appeal the case, and by the time the matter is finally disposed of I wonder whether the car is going [20] to be worth much.

The Court: Yes, as to the custody of the car. I asked counsel and he said the Government has the car now, Mr. Chotiner.

Mr. Chotiner: In other words, if they are willing to return the automobile, I am perfectly willing that that portion of the judgment be stricken. As a matter of fact, I didn't even know the basis of their objections until this morning. Apparently on their affidavit of mailing, either something went wrong with the United States Attorney's office or the Post Office department forgot to deliver it, but we never received a copy of their objections.

The Court: Well, I will overrule your objections to Mr. Chotiner's. I have gone over that and I feel that Mr. Chotiner's "findings" are all right. But as to this alternative on the car, are you willing to turn the car over or what are you going to do with it?

Mr. Jacobson: Well, your Honor, at this time I don't know. Regarding an appeal, that is strictly up to the Solicitor General.

The Court: That is right.

Mr. Jacobson: What he is going to do I don't know. However, I feel that the court lacks jurisdiction to grant a judgment for money in this type of case.

The Court: Well, I can see—Mr. Chotiner stated he didn't [21] know what they were going to do, and what is your thought on that, Mr. Chotiner? I mean if they take an appeal and it takes a year, you figure that the car won't be worth anything by the time it comes back; you want your judgment?

Mr. Chotiner: That is correct, and I think that under the general prayer here we would be entitled to get it, although I am not in position to represent your Honor this morning as a matter of law that your Honor does have jurisdiction to grant that type of a judgment, but I would say this, that if the matter were signed and that if they were to deliver the automobile, then the Government couldn't possibly be harmed by the alternative provision; whereas, if they intend to appeal anyway, then as long as we are going to have to contest it on appeal, at least we would want to be protected as to the value of the automobile.

The Court: If they knocked out anything, you still would be protected on it.

Mr. Chotiner: That is correct.

Mr. Jacobson: Your Honor, may I suggest this, that if there is error in granting the judgment for the alternative, the case can come back on a remand on that point alone and can be tried over again, on a point that may not be necessary to be decided now.

I would like to cite a case to your Honor on that.

The Court: Certainly. [22]

Mr. Jacobson: It is the Finn case, the Finn Twins, which was a civil action, 239 Federal 2nd, 679, where they were fighting over who had title to the airplane and as part of the defense, it was decided they would put in a counterclaim against the Government for the use of the plane, so to speak, and the Circuit in that case held that there is no Congressional authority for the counterclaim or for the claim to award the money judgment against the Government unless you find an Act of Congress which permits the United States to be sued and a counterclaim and an affirmative judgment of that sort would fall within that category. Then they don't have authority to get such a money judgment against the Government.

And I submit in this situation, on a close reading of the Finn case that I cited, you find the facts are somewhat analogous to the situation here, and you find that in this case there is no Congressional authority for the alternative judgment. It is not within the Torts Claims Act. I don't believe that it falls squarely within the Tucker Act as a claim under ten thousand dollars. If it did, it would be in the nature of an action for the reasonable value of the car today and not for the obtaining of the car.

So I submit, your Honor, that we have no basis for granting the alternative judgment. His prayer asks for the [23] return of the seized property and I suggest that that is the only judgment that can be awarded.

Now, if the Government decides to appeal, it is a right that the Government has and it should not be a factor in determining the type of judgment that the court has jurisdiction to enter.

Mr. Chotiner: Well, does counsel have any case, if I may inquire through the court, on the question of where there is a forfeiture sought by the Government and that the Government is not in a position to return the seized automobile, as to what the remedy is, the fact that we cannot obtain an alternative judgment against the Government?

We are not asking for a money judgment as such.

The Court: I understand.

Mr. Chotiner: It is strictly in the alternative. For example, suppose they had destroyed the automobile, surely we would not be without remedy.

Mr. Jacobson: Perhaps—I would like to point out to your Honor that until very recent years, people injured through the tort of a Government agency were without a remedy, and it is just a question of has the sovereign waived its immunity? If the sovereign hasn't waived its immunity in a situation like this, then you have no remedy.

Mr. Chotiner: Well, I think there has been a waiver where [24] a remedy is given to the Government to seize an automobile and forfeit it under libel proceedings. They take the initiative and then they can't be heard to complain that upon their failure to return the item in accordance with the court order they shouldn't be held responsible for the value of the automobile. It is just in lieu of it, unless there is some authority to the contrary.

The Court: Well, I am going to decide this case, Mr. Chotiner. I don't want you to go all the way up and defend this case on appeal and have it come back just on that question.

Mr. Chotiner. If they were reversed as to that, it would be just a matter of striking that portion, but if the Government is going to appeal anyway, we might just as well defend our position here.

The Court: Yes. Well, I personally don't think that we need to have the money in there about the judgment, but I can see Mr. Chotiner's position. If this matter takes two or three years and the car comes back and the car is practically a wreck, he has nothing. So I will sign it the way Mr. Chotiner has it. In other words, if we get reversed, Mr. Chotiner, we will just have to take that chance.

Mr. Chotiner: Now, I am willing to state here as a matter of record and enter into a stipulation to that effect, that [25] in the event of abandonment of any appeal or if no appeal is taken, I am perfectly willing that the judgment shall be amended to strike that provision for money judgment.

Mr. Jacobson: Well, of course, your Honor, I have no authority whatsoever to enter into such a stipulation.

The Court: We have a little approval as to form here. I don't know as you need to sign that.

Mr. Jacobson: I don't, once your Honor overrules the objections.

The Court: Well, I think we will just go ahead with it, Mr. Chotiner, on that basis. It might take a couple of years and then you wouldn't have anything when it came back.

Mr. Chotiner: That is correct. In other words, we are not after the money. We are after the automobile.

The Court: Yes, and they can solve that by giving you the car right now.

Mr. Chotiner: That is correct. So the Government would not be hurt by giving us the automobile.

The Court: Yes. All right.

Mr. Chotiner: Apparently someone wants to ride around in it. I notice in the file that somebody has already made a request for the automobile. They couldn't even wait to see what your Honor was going to rule.

Mr. Jacobson: As a matter of form, G.S.A. puts in a request for the order and it is a part of the court's file [26] in every case, pending the final outcome.

The Court: I think if the Government is going to take an appeal, what they should do is return the car. It is the fair way to do. Of course that is beyond your power, Mr. Jacobson.

Mr. Jacobson: That is true, your Honor, and here is just a comment on that point: Assuming that the Circuit would reverse on all points, and say that the Government gave the car back in the interim and that Mr. Rutherford sold the car to an innocent third party, who would be injured? The third party?

The Court: Well, I think we are worrying about a lot of things that may never happen.

Mr. Jacobson: That is right, but who knows?

The Court: I think the safe thing to do is to sign the Findings of Fact, Conclusions of Law and Judgment, which I have done at this time.

[Title of District Court and Cause.]

Certificate

I, Thomas B. Goodwill, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled matter on February 14, 1958 and March 3, 1958, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 11th day of April, A. D. 1958.

/s/ THOMAS B. GOODWILL,
Official Court Reporter.

[Endorsed]: Filed April 14, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court hereby certify the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 17, inclusive containing the original:

Libel of Information.

Monition of Respondent and Claimant C. H. Rutherford.

Objections to Findings of Fact, Conclusions of Law and Judgment.

Findings of Fact, Conclusions of Law and Judgment.

Notice of Appeal.

Designation of Record on Appeal.

B. One volume of Reporter's Official Transcript of Proceedings had on:

February 14, 1958 and March 3, 1958.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has not been paid by appellant.

Dated: April 14, 1958.

[Seal]

JOHN A. CHILDRESS,
Clerk,

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15979. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant vs. Charles H. Rutherford, Claimant of One 1957 Cadillac "62" Coupe De Ville, etc., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: April 15, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

CA No. 15979

UNITED STATES OF AMERICA,

Appellant,

vs.

ONE 1957 CADILLAC "62" COUPE DE VILLE,
License No. MLR 406, Motor No. 5762028343,
Its Tools and Appurtenances,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO REPLY

The United States of America, Libelant and Appellant in the above-entitled action, states that the points on which it intends to reply on the appeal in this action are as follows:

1. The District Court was without jurisdiction to render the judgment it rendered in the above-entitled proceeding.
2. The Findings of Fact, Conclusions of Law and Judgment are not supported by the evidence.
3. The Judgment is contrary to law.
4. The District Court committed prejudicial error in the admission and rejection of evidence.

Dated: This 18th day of April, 1958.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Asst. U. S. Attorney,
Chief, Civil Division.

/s/ BURTON C. JACOBSON,
Asst. U. S. Attorney,
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed April 21, 1958.

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